Supreme Court, U. S.
FILED
MAR 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1434

REX ALLEN WILSON, Petitioner

v.

STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF OHIO

M. Claude Sharf
3435 East Livingston Avenue
Columbus, Ohio, 43227
Counsel for Petitioner

March 19, 1979

INDEX

	PAGE
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement of the case	4
Reasons for granting writ	13
1. The decision below conflicts with prior decisions of this Court and with the provisions of the United States Constitution	13
2. The decision below conflicts with guarantees of the Vi Amendment to the Constitution of the United States and with Article I, Section 10 of the Constitution of Ohio	19
Conclusion	19
Appendix (Judgment of the Supreme Court of Ohio and opinion and judgment of the Court of Appeals of Franklin County, Ohio)	21

CITATIONS

Cases:

Brookhart v. Janis, 384 US 1	18
Henderson v. Maxwell, 176 OS 187	19
Queen v. Hepburn, (US) 7 Crouch 290	17
State v. Roberts, 55 OS(2d) 191	18
State v. Swiger, 5 OS(2d) 151	19
Terry v. Ohio, 392 US 1	16

Miscellaneous:

Article 1, Section 10, Ohio Constitution	17
IV Amendment, U. S. Constitution	13
Vi Amendment to U. S. Constitution	16

IN THE

SUPREME COURT OF THE UNITED STATES

_____

No. _____

_____

REX ALLEN WILSON, Petitioner

v.

STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF OHIO

_____

The Petitioner, Rex Allen Wilson, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in this proceeding October 20, 1978.

Opinion Below

The judgment of the Supreme Court of Ohio appears in the Appendix hereto. No opinion was rendered. The opinion of the Franklin County Court of Appeals, from which appeal to the Supreme Court of Ohio was taken, appears in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on October 20, 1978. This Petition for certiorari was filed within the time extension granted by this Court January 8, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the admission, in a criminal trial, of evidence seized in a search of a defendant's residence under authority of a search warrant, supported by an affidavit containing alleged representations of a named informant, where such representations were never made and where it is subsequently admitted by the police officer affiant that such representations were not made by the informant and were, in fact, false, violates a defendant's right to be secure in his person, house, papers and effects against unreasonable searches and seizures granted and guaranteed by the IV Amendment to the Constitution of the United States.

2. Whether the admission of hearsay testimony, in a criminal trial, violates a defendant's right to be confronted with the witnesses against him as granted by the VI Amendment to the Constitution of the United States, and defendant's right to meet the witnesses face to face as guaranteed by Article I, Section 10 of the Constitution of the State of Ohio.

STATEMENT OF THE CASE

On Sunday, March 13, 1977 at approximately 2:00 P. M., the bodies of Peter Cantu and David Bopp were discovered at a farmhouse on Feder Road, Columbus, Franklin County, Ohio. The cause of death of each was determined to be multiple, small caliber bullet wounds to the head of each. The bodies were discovered by one Gail Dennison and one Victor Cook Loeffel, Jr. The series of events and circumstances leading to the arrest and trial of Petitioner, Rex Allen Wilson, are as follows:

On Friday, March 11, 1977, Peter Cantu, a known dealer in drugs, met William Manchester at Manchester's apartment in Columbus, Ohio, where Manchester paid Cantu $250.00 for drugs (marijuana) purchased by Manchester from Cantu. Cantu later met with Victor Cook Loeffel, Jr. at a bar in Columbus, Ohio, known as the "Blue Danube," where Loeffel gave Cantu four (4) one (1) pound bags of marijuana and approximately six (6) grams of cocaine, all valued at $1,900.00, to be paid for

by Cantu the following day, March 12, 1977. Following this transaction, both Cantu and Loeffel went to a party where they stayed until the early morning hours of Saturday, March 12, 1977. David Bopp also attended the same party.

In the early morning hours of Saturday, March 12, 1977, Cantu and Bopp returned to their residence at Feder Road, approximately 4:00 A.M., where they discovered one Ton Tweed, an acquaintancefrom Piqua, Ohio, allegedly asleep in his car. Cantu and Bopp allegedly awakened Tweed and invited him into the house. Bopp went to his bedroom on the second floor. Cantu displayed four (4) bags of marijuana and a packet of cocaine to Tweed. Cantu left the marijuana, his wallet and keys on the coffee table in the living room and went to his bedroom. Tweed remained at the house for a short time then left the house to sleep the rest of the night in his car outside. This is the last time anyone can place Cantu's wallet or the marijuana at the Feder Road address. Tweed, by his own statement, departed the Feder Road address at approximately 7:30 A. M..

On Saturday, March 12, 1977, Petitioner, Rex Allen Wilson, drove from his residence near Raymond, Union County, Ohio, to the Feder Road address, a distance of approximately 45 miles, for the purpose of buying marijuana from Cantu. Cantu and Petitioner were close friends, having attended school together in Marysville, Ohio.

Upon arrival at the Feder Road address, Petitioner was admitted by Bopp at approximately 1:30 P. M.. Upon entering the house, Petitioner proceeded into the living room where he observed Cantu lying on the couch. Bopp told Petitioner that Cantu had fallen and hit his head; that he, Bopp, had called an ambulance and that if Petitioner had any "dope" on him, he should get rid of it.

Petitioner spoke to Cantu, but received no answer. Petitioner observed a bloody rag under Cantu's head.

Petitioner had been at the premises but a short time when three (3) individuals arrived, two (2) of them being Robert Wintringham and

and Victor Loeffel. These three (3) individuals remained but a very short time and left after Bopp repeated the admonition about having "dope" with them. Petitioner left immediately after as he was unable to purchase any marijuana from Cantu, who remained silent on the couch during the entire time Petitioner was at the Feder Road address.

Upon leaving the Feder Road address, Petitioner drove to the home of his parents at 17783 Banjo Road, Marysville, Ohio, a distance of approximately thirty (30) miles, where he arrived at approximately 2:15 P. M.. While at his parent's home, Petitioner ate lunch and borrowed $20.00 from his father. Petitioner remained at his parents home for approximately one-half hour and returned to his residence near Raymond, Ohio, a distance of 12-14 miles, arriving at approximately 3:00 P. M., where he remained for approximately one-half hour.

At approximately 3:15 - 3:30 P. M., Petitioner sold 1/2 pound of marijuana to one Harold Fraker, for a price of $200.00. From Fraker's residence,

Petitioner drove back to Marysville, Ohio, where he gave 21/2 pounds of marijuana to one George Dingledine because Dingledine wanted the marijuana for his customers. From Dingledine's house, Petitioner proceeded to the home of one Kenny Moder, in Marysville, Ohio, where he sold a pound of marijuana for $404.00, which Moder had ordered some time earlier. The marijuana referred to being marijuana which Petitioner had purchased on Friday, March 11, 1977, from one Chuck Stacy.

After selling the marijuana to Moder, Petitioner proceeded back to his residence near Raymond, Ohio and his whereabouts are accounted for until the early morning hours of Sunday, March 13, 1977. During the afternoon of March 13, 1977, Petitioner was involved in a minor traffic accident with his automobile in Union County, Ohio, investigated by Trooper Theodore Byus of the Ohio State Highway Patrol, in which Petitioner received a minor cut on his wrist, the blood from which Petitioner wiped on the jeans he was wearing.

March 16, 1977, Petitioner was arrested by

detectives from the Columbus, Ohio Police Department Homicide Squad, charged with two (2) counts of aggravated murder, and his residence on Hoover-Bault Road, Raymond, Ohio, was searched under authority of a search warrant secured by the use of sworn statements of the police of false information. During the search of Petitioner's residence, two (2) .22 caliber handguns, one of which was inoperable, the pair of jeans containing blood-stains from the auto accident of March 13, 1977, and a number of wallets belonging to Petitioner were seized.

Petitioner's Motion to Suppress the evidence, timely filed, was overruled, even though it was admitted by the affiant of the search warrant affidavit, Sergeant John Tilley, that certain statements contained in the affidavit in support of the search warrant contained false information.

Petitioner was brought to trial, convicted of two (2) counts of aggravated murder and sentenced to death. During the course of the trial, Dr. Nobuhisa Baba, the pathologist who performed

the autopsy upon the bodies of both decedents, testified that both had died of multiple gunshot wounds to the head. Dr. Baba identified the bullet fragments removed from the bodies of both decedents and testified that the wounds in the head of Cantu were uniformly 8mm, or .33 inch, in diameter and that the wounds in the head of Bopp were varied in size, one being 5 mm (.20 inch), two being 6mm (.26 inch), and one being 7 mm (.28 inch). Dr. Baba was unable to pin-point the time of death of either but estimated the time of death to be mid to late afternoon of March 12, 1977, when Petitioner was in Union County, Ohio, some 30 - 45 miles from the scene of the homicides, by the testimony of the State's own witnesses.

During the trial, the State's ballistic "expert," one Steve Molnar, Jr., of the State Bureau of Criminal Identification Investigation, testified that the bullet fragments removed from the bodies of both decedents were so fragmented that a ballistic comparison was impossible, but it was his opinion that all fragments were of .22 short

ammunition. After examination of the two (2), .22 caliber handguns seized in the search of Petitioner's house, which were admitted into evidence over objection, Mr. Molnar testified one of the weapons was damaged and not operable and the other, while operable, was eliminated because the characteristics of the bullets fired from the oprable weapon were not compatible with the fragments from the bodies of the decedents. The damaged weapon, by Molnar's testimony, could not be eliminated because, in his opinion, the fatal bullets were fired from a weapon containing a rifling of six (6) lands and grooves; that the fragments could have been fired from a rifle as well as a handgun and that the fragments could have been fired from any one of 4 or 5 different makes of weapons.

During the trial, the jeans, with bloodstains seized in the search of Petitioner's house, were introduced into evidence, over objection, and it was testified to by one Richard C. Fischer, an employee of the Columbus, Ohio, Police Department Crime Laboratory, that the bloodstains on

the jeans were blood type "A". Evidence was introduced that the blood type of both decedents was type "A". It was stipulated that Petitioner's blood tyoe also was "A".

During the course of the trial, testimony was admitted, over objection, by one Darrell Smith, of an alleged conversation which he (Smith) had with decedent Cantu concerning Petitioner's owing Cantu $1,600.00 for drugs which Cantu had allegedly supplied to Petitioner. Petitioner was not present during this alleged conversation, which was alleged to have occurred on March 1, 1977, nearly two (2) weeks before the homicides. One of the wallets seized in the search of Petitioner's residence was introduced, over objection, and identified by Smith as being Cantu's wallet, although subsequent testimony identified the wallet as having belonged to Petitioner for several years.

Upon conviction, Petitioner was sentenced to death and transported to the Ohio Penitentiary at Lucasville, Ohio, where he remains on death row at the present time.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WITH THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

The IV Amendment to the Constitution of the United States guarantees that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation..."

In the affidavit in support of his application for a warrant to search the house of Petitioner, Sergeant John Tilley, of the Columbus, Ohio Police Department Homicide Squad stated, under oath, that "Through Darrell Smith police learned that Rex Wilson had been involved in drug transactions with Cantu. Smith was present 3-8-77 when Cantu and Wilson had discussions about the latter owing victim $1600 for drugs which was to be repaid by last week-end."

At the hearing on Petitioner's Motion to Suppress evidence seized pursuant to such a search

warrant, Darrell Smith, the informant named in the affidavit was asked the folowing questions and gave the following answers:

"Q. All right. Now Mr. Smith, did you -- were you present on March 8th of this year, 1977, at a meeting between Peter Cantu and Rex Wilson?

A. No, I wasn't.

Q. Did you see Rex Wilson and Peter Cantu together at all on March 8, 1977?

A. No, I did not.

Q. Did you tell the police that you saw, that you were present when Rex Wilson and Peter Cantu had a meeting on March 8, 1977?

A. No, I did not.

Q. Did you tell them -- did you tell the police of a meeting on March 8th of 1977, between Peter Cantu and Rex Wilson in which you were present, and there was a discussion concerning money which Rex Wilson owed to Peter Cantu?

A. No, I did not.

Q. Are you familiar with a Columbus Police Officer by the name of Sergeant John Tilley?

A. Yes. I am.

Q. Did you tell Sergeant John Tilley on that, on March 8th, 1977, you were present at this meeting between Rex Wilson and Peter Cantu?

A. No, I did not."

At the same hearing, Sergeant John Tilley was asked the following questions and gave the following answers:

"Q. All right, and you swore to the truth of the allegations contained in the affidavit, did you not?

A. Yes, I did.

Q. Now directing your attention, sir, to Line 17 od Attachment No. 1 commencing with the phrase 'Smith was present 3-8-77' do you see that?

A. Yes sir.

Q. Would you read that sentence, please?

A. (Reading) 'Smith was present 3-8-77 when Cantu and Wilson had discussions about the latter owing victim $1600.00 for drugs which was to be repaid by the last week-end.'

Q. Now, Sergeant Tilley, that is not true, is it?

A. That's correct.

Q. But, you swore to the truth of it?

A. Yes, sir."

To permit the use of false testimony and direct misrepresentations to form the basis of the issuance of a warrant to search a man's home flies directly in the face of the mandate of the U. S. Constitution and the decision of this Court in Terry v. Ohio, 392 US 1, wherein this Court said that without the rule excluding seized evidence, seized in violation of the Fourth Amendment, a principal mode of discouraging, and the only effective deterrent to, police misconduct in the criminal context, the constitutional guarantee against searches and seizures would be a mere form of words.

2. THE DECISION BELOW CONFLICTS WITH THE GUARANTEES OF THE VI AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND OF ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO.

The Sixth Amendment to the Constitution of the United States guarantees that "in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.."

Article I, Section 10 of the Constitution of the State of Ohio guarantees that "...In any trial, in any court, the party accused shall be allowed....to meet the witnesses face to face."

Darrell Smith, a witness for the prosecution, was permitted to testify, over objection, of an alleged conversation between Peter Cantu and Smith, at which Petitioner was not present, concerning an alleged debt owed by Petitioner to Cantu for drugs, which was allegedly required to be paid the week-end of Cantu's demise. The testimony was offered to prove the truth of the matter asserted. The testimony was allowed as an excepton to the hearsayrule as being a statement against the penal interest of Cantu, who was not a party to this action and was, in fact, dead.

The hearsay statements admitted over objection were not made in the presence of Petitioner, not made under oath, and Petitioner was not, and could never be, granted his constitutional right of confrontation and cross-examination.

In Queen v. Hepburn, (US) 7 Crouch 290, 3 L. Ed. 398, Chief Justice Marshall of the United

States Supreme Court asserted that this species of testimony (hearsay) is not excluded soley because it presupposes some better testimony, but rather because of it's intrinsic weakness, it's incompetency to satisfy the minds of the jury of the existence of the facts, and the fraud which might be practiced under it's cover.

The Supreme Court of Ohio, in State v. Roberts, 55 OS(2d) 191, held "Where a witness who testified against the defendant at a preliminary hearing and was not cross-examined, is later shown to be unavailable to testify at the trial, the Sixth Amendment to the United States Constitution precludes the state's use of the witness's recorded statement, notwithstanding R. C. 2945.49."

The right secured by the Sixth Amendment to an accused to confront the witnesses against him, which includes cross-examination, is to be enforced against the states under the Fourteenth Amendment. (Brookhart v. Janis, 384 US 1). The purpose of the constitutional provision according the accused the right to confront his accusers and the

witnesses against him is to provide the accused the right of cross examination. (Henderson v. Maxwell, 176 OS 187, State v. Swiger, 5 OS(2d) 151). Petitioner was summarily denied these rights by the actions of the lower courts.

Petitioner was brought to trial on two counts of aggravated murder with death penalty specifications, convicted, and sentenced to death. Appeal was taken to the Court of Appeals of Franklin County, Ohio and on June 27, 1978, the judgment of the lower court was affirmed. Petitioner's Motion for leave to appeal to the Ohio Supreme Court was overruled October 20, 1978. Petitioner was granted an extension of time in which to file his Petition for Writ of Certiorari to March 19, 1979 by the Court on January 8, 1979.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the lower court.

Respectfully submitted

M. Claude Sharf
3435 East Livingston Avenue
Columbus, Ohio, 43227
Counsel for Petitioner

March 19, 1979

APPENDIX

THE SUPREME COURT OF THE STATE OF OHIO

1978 Term

To wit: October 20, 1978

State of Ohio

Appellee

vs. No. 78-1090

Rex Allen Wilson

Appellant

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS for Franklin County, Ohio

It is ordered by the Court that this motion is overruled.

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

State of Ohio :
:
Plaintiff-Appellee :
:
v. : No. 77AP-678
:
Rex Allen Wilson :
:
Defendant-Appellant :

D E C I S I O N

Rendered on June 27, 1978

STRAUSBAUGH, J.

This is an appeal by Defendant from a conviction in the Common Pleas Court of Franklin County for two counts of aggravated murder in violation of R.C. 2903.01.

Defendant was indicted on March 23, 1977. The first count of the indictment specified that Defendant committed the murder of Peter Cantu during the commission of an aggravated robbery in violation of R.C. 2929.04 (A)(7). The first count included the additional specification that Peter Cantu's murder was part of a course of conduct in

which Defendant purposely killed both Peter Cantu and David Bopp in violation of R.C. 2929.04(A)(5).

The second count of the indictment charged Defendant with the aggravated murder of David Bopp by prior calculation and design with specifications that the murder was part of a course of conduct whereby Defendant killed both David Bopp and Peter Cantu.

The Defendant waived a jury, and on June 7, 1977, a three judge panel found Defendant guilty to both counts and to all specifications. No mitigating circumstances were found in the hearing held on July 29, 1977, and Defendant was sentenced to death.

The record reveals that the bodies of Peter Cantu and David Bopp were discovered in their residence at 6028 Feder Road, Franklin County, on March 13, 1977. Gail Dennison, a neighbor who had been employed by the victims to clean their farm house residence, discovered the bodies of the victims.

Gail Dennison testified that she discovered Peter Cantu's body on the couch in the living room,

with a blood stained sleeping bag over his head. (Tr-307) Police at the scene also discovered a blood stained rag beneath Peter Cantu's head. (Tr-289) Blood tests revealed that the blood was Type A.

After being summoned by Gail Dennison, police discovered David Bopp's body in a second floor bedroom where there were signs of a struggle. (Tr-90) Both bodies were discovered without money or wallets on them.

PathologistDr. Nobushia Baba testified that each of the decedents had been shot four times in the head at close range. Dr. Baba further testified, in response to a hypothetical question, there were no wounds about the head of Peter Cantu that could have caused such bleeding other than the four bullet holes. (Tr-177)

At the scene of the crime police discovered a live round of .22 caliber short ammunition and a .22 caliber cartridge case next to the head of David Bopp. (Tr-103,104) The police also discovered a small bag of cocaine in Cantu's bedroom closet. (Plaintiff's Exhibit 5(K).)

On March 16, 1977, the police executed a search warrant on the residence of Rex Allen Wilson at 23054 Hoover Bault Road in Union County. In the residence the police discovered: a pair of blood-stained blue levi's, a .22 caliber H&R revolver, a .22 caliber Hall's six shot revolver, six rounds of .22 caliber cartridges, $200 cash, seven wallets, including State's Exhibit (15(A), two bags of marijuana, and a white T-shirt with red trim. (Tr-275) The blood on the Levi's was found to be Type A blood (Tr-291). The police discovered $135.00 on Defendant when they arrested him.

Steve Molnar, the State's ballistic and firearms expert, testified that the Hall's six shot revolver could not have been the murder weapon. Mr. Molnar further testified that the H&R revolver could have been the murder weapon but that he could not conclusively state that it was the murder weapon because of the distortion of the bullet. (Tr-231,232)

The night before the murder, March 11, 1977, Tom Tweed testified that he drove from Troy, Ohio to Columbus and stopped to see Peter Cantu (Tr-351), arriving in the early morning hours of March 12, 1977. Finding no one at home at the Feder Road farm house, he went to sleep in his car. Peter Cantu awoke Tweed around 4:00 A.M., and invited him into the house. Once in the house, Tweed testified that Cantu showed him 4 pounds of marijuana in one pound zip locked baggies, and a big bag of cocaine. Tweed also took note of Cantu's wallet which was laying on the coffee table. Tweed Testified that the wallet was light tan leather with laces around the edges and some design tooled into it. (Tr-360) Cantu invited him to sleep the rest of the night on the couch and gave him a sleeping bag but after sitting in the chair for about ten minutes, Tweed testified that he did not sleep in the house because he was uncomfortable with all the drugs present. (Tr-361) Tweed spent the rest of the night in his car and drove away around 7:30 a.m. (Tr0362)

Victor Loeffel testified that Robert Winteringham, Jack Miesmer and he drove to the Feder Road farm house on March 12, arriving around 1:45 p.m. Loeffel saw a red Pontiac Firebird parked outside. Loeffel entered the house, and noted that there were three persons present. Peter Cantu, lying on the couch with a bloody rag behind his head, David Bopp who was kneeling beside the couch attending to Cantu, and a then unknown third person, later indentified as the defendant, who was standing near the front of the couch. (Tr-615)

Loeffel stated to the trial court that the following conversation took place:

"Loeffel: What's happening?

"bopp: I don;t know, I just got here.

"Wilson: Are you guys friends of Pete's?

"Loeffel: Yes, is he allright?

"Bopp: I don't know. He is convulsing.

"Loeffel: Maybe we ought to call the emergency squad.

"Wilson: I already called the emergency squad.

"Bopp: Oh, you already called the emergency squad?

"Wilson: Yes, and *** if you guys have any dope or anything you better leave.

"Loeffel: Peter are you allright?"

Loeffel testified that Cantu just groaned. (Tr-621-625) At that time, Loeffel, Winteringham and Miesmer left the residence. The three men drove home, taking between twenty and thirty minutes. Loeffel called Cantu's residence immediately upon arriving home but the phone rang unanswered.

Winteringham's testimony substantially supported Loeffel's version of the encounter at the farm house.

Loeffel also testified that the night before the murder, he had met Peter Cantu at the Blue Danube Restaurant to complete a drug transaction. At approximately 11:00 p.m. that evening, in the parking lot of the restaurant, Loeffel handed Cantu four one pound ziplock baggies of Columbian Marijuana and six grams of cocaine. No money changed hands and it was agreed that Cantu owed

Loeffel $1900. (Tr-605-607)

At the trial Loeffel admitted that concern over receiving his $1900 motivated him to visit Cantu in the early afternoon on March 12. This concern also led Loeffel to call the Feder Road farm intermittently that day on the 12th, and to stop back at the farm house at 4:00 p.m. that afternoon. On Sunday the 13th, Loeffel returned at approximately 1:00 p.m. and received no answer when he knocked on the door. Loeffel then picked up Gail Dennison at her neighboring farm house. Gail Dennison went into the house through the cellar doors and discovered Cantu's body on the couch in the living room.

Loeffel and Winteringham were positive that the unknown third person they encountered at the farm house was Rex Allen Wilson. They identified Wilson at the trial and by photograph during the police investigation. (Tr-618-561)

David Diehl testified that he was acquainted with both the Defendant and the victim Cantu and that he was aware that both Cantu and Defendant

were trafficking in marijuana. Diehl also testifiedthat in January or February, 1977, he witnessed a drug transaction at Cantu's previous home between Cantu and Wilson, wherein Cantu supplied five pounds of marijuana at $350 per pound to Wilaon; that no money exchanged hands and Diehl understood that Wilson owed Cantu $1550 for the five pounds, (Tr-401-402)

Diehl also testified that he stopped by Wilson's residence on Hoover-Bault Road at sometime between 12:30 and 1:30 p.m., March 12, 1977, the day of the murder, and Defendant was not home.

Bruce Wollens testified that he was at the victims's home at approximately 1:10 p.m. on March 12 before going over to Gail Dennison's farm house. Wollens talked to Cantu for a few minutes and then left. (Tr-380) Wollens stated he did not see Bopp.

Defendant's roommate John Cooper testified that Defendant arrived home on March 12th at 2:45 p.m. (Tr-420) Cooper also testified that he was aware that Cantu and Wilson were involved in drug trafficking. (Tr-416)

Darrell Smith, an associate of both the Defendant and the victim Cantu, testified that he knew that Cantu regularly "fronted" marijuana. Smith explained that fronted meant that the seller transferred the marijuana to the buyer who would pay at a leter date. (Tr-531) Smith told the trial court that Cantu kept a record of each transaction on a piece of paper in his wallet. (Tr-531-532)

Smith further testified, over objection, that on March 1, 1977, Cantu told him that Wilson owed Cantu $1600 for marijuana Cantu had transferred to Wilson, and that he (Cantu) had only received a $200 payment from Wilson. Smith observed that Cantu was angered over Wilson's failure to pay for the marijuana. (Tr-537)

Smith also testified that in February he had an opportunity to inspect Cantu's wallet. Smith noted the type of stitching and tooling of the wallet and specifically noted an imperfection in the tooling, and positively identified State's Exhibit 15A as Peter Cantu's wallet. (Tr-543)

Kenneth Moder testified that nearly two weeks before March 12, 1977, he had placed an order with Defendant for one pound of marijuana; that on March 12, he called Defendant at 11:00 a.m., and asked Defendant if he could buy some marijuana from him, that Defendant said he could obtain a pound of marijuana and would deliver it to Moder. (Tr-462-463)

Moder testified that at approximately 4:00 or 5:00 p.m., the Defendant arrived at Moder's home and sold Moder one pound of marijuana for $404. (Tr-464)

Harold Fraker testified that on March 12 at approximately 3:30 to 4:00 p.m., the Defendant arrived at his house with a full pound of Columbian Marijuana. (Tr-471) Harold Fraker further testified that they split the pound into two half pounds; that Fraker bought one half pound for $200 (Tr-474); that Defendant indicated that Fraker should reveal Defendant as the supplier because "the guy he got it from was hot." (Tr-475)

George Dingledine testified that at

approximately 5:00 p.m. on March 12, the Defendant flagged him down and went with Dingledine to Dingledine's residence. There, the Defendant asked Dingledine to hold two and one-half pounds of Columbian Marijuana for him. (Tr-446-448)

A gun shop owner from Marysville, Scott Bowersmith, testified that on March 11, 1977, the Defendant bought two boxes of .22 caliber shells from his gun shop. (Tr-483)

Mrs. Wilson, the Defendant's mother, testified that Defendant arrived at her residence at approximately 2:00 to 2:15 p.m., on March 12, ate lunch, and borrowed $20 before leaving 30 to 45 minutes later. (Tr-700)

Mr. Wilson, the Defendant's father, was also present at their residence on March 12, 1977. His testimony substantially supported his wife's.

The Defendant took the stand in his own behalf. He admitted being at the farm house on Feder Road between 1:30 and 1:45 p.m.. Defendant testified that Cantu and

Bopp were both present at the Feder Road farm house, but that Cantu was injured and lying on the couch with a bloody rag behind his head. (Tr-804-806) Defendant further testified that Bopp told him that he (Bopp) had called an ambulance as Cantu had fallen and hit his head. Defendant also testified that Bopp told him if he had any drugs on his person he had better leave. (Tr-806)

Defendant further testified that at this time three men appeared, and that he recognized two of them as Winteringham and Loeffel. Defendant testified that he told them an ambulance was on the way, and that they left a few minutes later, and that he left a few minutes after that.

On the stand Defendant denied ever owing Cantu $1600. Defendant also testified that the wallet, State's Exhibit 15A, was his and that the four pounds of marijuana he disposed of on the afternoon of the 12th was obtained from a source other

than Cantu.

Defendant also testified that he was injured in an automobile accident, and that the blood on his pants came from wiping his cut wrist on the pant leg.

Defendant's first assignment of error is:

> "The trial court erred in overruling Defenant's motion to suppress evidence seized in a search of Defendant's residence pursuant to a search warrant issued without probable cause."

As the basis for this error, the Defendant relies on an admittedly erroneous representation made by a police officer in presenting an affidavit for a search warrant. In the affidavit, the officer stated that Darrel Smith was present when a particular discussion took place, when in fact Smith was merely told of the discussion subsequently. TheDefendant does not assert that this error was intentional or reckless, but that affidavits containing false information cannot be the basis for the issuance of a search warrant. We concur with the Sixth Circuit in that "we do not believe that good faith error in a carefully prepared search warrant affidavit should be held to require suppression of evidence.***" United States v. Luna (1975), 525 F. 2d ., at page 9.

The Defendant concedes that the warrant could have been based on information in question had it been properly characterized as hearsay. The court also notes that the affidavit contained overwhelming evidence placing the Defendant at the scene of the crime immediately prior to the estimated time of perpetration, and he did own a weapon of the same caliber as the murder weapon. Considering the magnitude of the other information contained in the search warrant affidavit, the court finds probable cause existed irrespective of the inadvertent error in the affidavit. Consequently, the Defendant's first assignment of error is overruled.

Defendant's second assignment of error is:

> "The prosecution failed to sustain the burden of proving all of the essential elements of the charges contained in the indictment beyond a reasonable doubt.."

The Defendant argues that insufficient evidence was introduced to establish a robbery and thereby satisfy the requirements of R.C. 2903.01(B) on the first count, or the requisite degree of "prior calculation and design" on the second count under R.C. 2903.01(A). As to the establishment of a robbery, the state relies most strongly on the positive identification of a wallet found in Defendant's apartment as belonging to the vistim. Neither victim had a wallet in his possession when found by the police. Loeffel and Smith identified the wallet as Cantu's; Wilson and his mother and father identified the wa-let as Defendant's. Although the evidence as to the ownership of the wallet is in conflict, we

defer to the determination at trial of the relative weight and credibility of the testimony. The wallet,coupled with the Defendant's disposing of a quantity of marijuana exactly equal to the quantity missing from the victim's residence when the Defendant was shown to have been without any quantity of marijuana a short time before the murder, provides sufficient evidence of a robbery to support the trial court's determination.

The issue reaised as to count two is very similar to that raised in State v. Forbes, unreported case number 77AP-250 (1977 Decisions, page 3021). As in Forbes we find the facts in the present case distinguishable from those in State v. Jenkins, (1976), 48 Ohio App. 2d 99. In that case the Defendant appears to have had more than sufficient time to design his acts. According to the patholigists testimony, Cantu had already been shot when the Defendant told three witnesses and the subsequent

s cond victim that Cantu had merely fallen and struck his head. After some discussion, the three witnesses left and the second victim was later found on the second floor of the residence, (the first victim being found on the first floor), apparently to silence an eyewitness. Under these circumstances, the second assignment of error must be overruled.

Defendant's third assignment of error is:

> "The trial court erred in permitting, over objection, hearsay testimony by Darrell Smith of a conversation with the decedent, Peter Cantu, at which Defendant was not present."

The state asserts that the hearsay evidence was properly sdmitted as a declaration against penal interest with the declarant unavailable. Since the declarant was one of the victims of the crime, his unavailablity is not at issue. Under Federal Rule 804(b)(4), the witnesses's testimony as the the declaration of the vistim would be admissable, and apparently would

not require corrorboration since it did not tend to exculpate the Defendant. The most recent pronouncement on the subject by the Ohio Supreme Court is State v. Williams, (1975), 43 Ohio St. 2d 88, in which the court seems to expand the rule of G. M. McKelvey v. General Casualty Co. of America, (1957), 166 Ohio St. 401, (which recognized only the declarations against pecuniary or proprietary interests) to include declarations against penal interests. The first paragraph of the syllabus in Williams states:

> "1. Where on a motion for a new trial based on newly discovered evidence, movant seeks to introduce hearsay evidence which purports to be within the declarat-on-against-penal-interest exception to the hersay rule, he must first establish the unavailability of the declarant."

Although the hearsay involved in the Williams case was excluded because of the availability of the declarant, the Supreme Court does refer to the declaration against penal interest as an exception to the hearsay rule. As this court held in State v.

Garland, unreported case number 77AP-373, rendered October 27, 1977 (1977 Decisions, page 3777), "under proper circumstances, hearsay testimony consisting of an admission agsinst penal interest by an absent declarant may be admissable in either a civil of criminal trial***."

Although Williams does not discuss any corrorboration provision of the exception, the Supreme Court's reference to the Federal Rules would seem to support the inclusion of a similar provision in the Ohio version of the exception. The Defendant argues that no evidence of corroboration was introduced and therefore the requirements of the exception have not been met. The Federal Rule states:

> "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissable unless corroborating cirsumstances clearly indicate the trustworthiness of the statement." (Rule 804(b)(4) of the Federal Rules of Evidence)

In the present case, however, the de-

claration against interest made by the declarant tends not to exculpate the Defendant, but rather, to establish a motive for the murder of the first victim. Under these circumstances, no corroborating evidence is required by the Federal Rules. Even if the court assumes corroborating evidence is required, the testimony of David Diehl, who witnessed the so-called "fronting" of approximately $1600.00 of marijuana from Cantu to Wilson, provides sufficient corroboration to make the hearsay statement trustworthy enough for admission. Defendant's third assignment of error is overruled.

The fourth assignment of error is:

> "The trial court erred in admitting over objection, testimony of other crimes and offenses which had no bearing upon the charges for which Defendant was on trial."

This fourth allegation of error seems to be completely devoid of merit. The testimony of crimes and offenses complained of relate to the victim Cantu's

dealing in drugs, with these dealings being inextricably linked with Cantu's eventual murder. The state offers the testimony of drug dealings as a possible motive for the shooting of Cantu, since the Defendant owed the victim money from their recent transaction, as well as the theft of another quantity of marijuana in Cantu's possession. The testimony also corroborates the declaration against interest as already discussed. The fourth assignment of error is overruled.

Defendant's final assignment of error is:

"The verdict is against the manifest weight of the evidence ans is contrary to law."

The state has instoduced a substantial body of evidence placing the Defendant at the scene of the crime immediately prior to the murders. TheDefendant apparently lied to the four people concerning how Cantu received his initial wound, with Cantu and one of the witnesses subsequently being found

shot to death. The Defendant possessed a weapon which experts say could have been the murder weapon. A wallet was found in the Defendant's room which was positively identified as belonging to Cantu, along with evidence that the Defendant suddenly came into possession of the exact same quantity and type of marijuana as was missing from Cantu's residence. Finally, the Defendant owed Cantu money which he was having some difficulty repaying. In the fact of this type of evidence, we cannot say the verdict is against the manifest weight of the evidence or contrary to law.

All of the Defendant's assignments of error are hereby overruled and the judgment is affirmed.

Judgment affirmed.

HOLMES, P.J., and REILLY, J. concur.

Supreme Court, U. S.
FILED
APR 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1978

No. 78-1434

REX ALLEN WILSON,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE C. SMITH
Prosecuting Attorney
Franklin County, Ohio
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555

and

ALAN C. TRAVIS
Assistant Prosecuting Attorney

Counsel for Respondent

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

INDEX

Opinions Below 1
Jurisdiction 1
Questions Presented for Review 1
Statement of the Case 2
Argument 5
Conclusion 9
Certificate of Service 10
Appendix 11

CITATIONS

Bird v. *Hueston*, 10 Ohio State 418 (1859) 7
California v. *Green*, 399 U.S. 149 (1970) 7
Chambers v. *Mississippi*, 410 U.S. 284 (1973) ... 7
Kahn v. *Flood*, 550 F. 2d 784 (2nd Cir., 1977) ... 6
Neighbors v. *State*, 121 Ohio State 525 (1930) ... 7
State v. *Williams*, 43 Ohio State 2d 88 (1975) 7
United States v. *Bagley*, 537 F. 2d 162 (5th Cir., 1976) 7
United States v. *Goodlow*, 500 F. 2d 954 (8th Cir., 1974) 7
United States v. *Luna*, 525 F. 2d 4 (6th Cir., 1975) 6
United States v. *Marihart*, 492 F. 2d 897 (8th Cir., 1974) 6
United States v. *Rosenbarger*, 536 F. 2d 715 (6th Cir., 1976) 6
United States v. *Scherer*, 523 F. 2d 371 (7th Cir., 1975) 6
United States v. *Taxe*, 540 F. 2d 961 (9th Cir., 1976) 6
United States v. *Ventresca*, 380 U.S. 102 (1965) 5
20 *American Jurisprudence*, Evidence 556, p. 467 7
Federal Rules of Evidence, Rule 804(b)(3) 7
Jones on Evidence, 4th Ed., Vol. I, 324, p. 602 ... 7
McCormick on Evidence, 255, p. 549 7

IN THE

Supreme Court of The United States

October Term, 1978

No. 78-1434

REX ALLEN WILSON,
Petitioner,

-vs-

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for Franklin County, Ohio is adequately set out in the petition. The judgment of the Ohio Supreme Court declining a motion for leave to appeal is adequately set out in the petition.

JURISDICTION

Jurisdiction is adequately set forth in the petition, 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A SEARCH WARRANT AFFIDAVIT WHICH CONTAINS AN OVERWHELMING AMOUNT OF INFORMATION CONSTITUTING PROBABLE CAUSE IS VITIATED BY A GOOD FAITH UNINTENTIONAL ERROR IN REFERRING TO ONE OF THE SEVERAL NAMED SOURCES OF INFORMATION AS HAVING PERSONAL

KNOWLEDGE OF A FACT RATHER THAN HEARSAY KNOWLEDGE OF THAT FACT.

II. WHETHER A STATE MAY ADOPT THE DECLARATION AGAINST PENAL INTEREST OF A DECLARANT SHOWN TO BE UNAVAILABLE AS AN EXCEPTION TO THE HEARSAY RULE.

STATEMENT OF THE CASE

On March 23, 1977, petitioner was indicted by the Franklin County, Ohio Grand Jury for the purposeful aggravated murders of Peter Cantu and David Bopp, in violation of Ohio Revised Code, Section 2903.01. Petitioner waived trial by jury. The case was tried to a three judge panel which found petitioner guilty on June 7, 1977. An appeal as of right was taken to the Court of Appeals of Ohio, Tenth Appellate District. That court affirmed by unanimous decision, June 27, 1978. A motion for leave to appeal to the Ohio Supreme Court was overruled on October 20, 1978. On April 3, 1979, in conformity with this Court's decision in *Lockett* v. *Ohio*, 438 U.S. ———— (1978), the Court of Common Pleas, Franklin County, Ohio vacated the death sentence and reduced the sentence to life imprisonment. (Appendix, p. 11)

The bodies of the victims were discovered on March 13, 1977, after a neighbor arrived at the home. Victim Cantu was on a couch in the living room with a blood-stained sleeping bag over his head. Victim Bopp was found in a second floor bedroom which showed signs of a struggle. No money or wallets were found. Each victim had been shot four times in the head. The pathologist testified that there were no wounds in

Cantu's head which could have caused bleeding other than the four bullet wounds. A live round of .22 caliber ammunition and a spent .22 caliber cartridge case were found by Bopp's body.

Pursuant to a search warrant, two .22 caliber revolvers plus ammunition, seven wallets, two hundred dollars in cash, cocaine, marijuana and a white T-shirt were seized from petitioner's house. A ballistics expert testified one of the revolvers could have been the murder weapon but due to distortion of the bullets, a conclusive opinion could not be given.

Tom Tweed visited Cantu during the early morning hours of March 12, 1977. He observed four pounds of marijuana packaged in zip-lock bags, a bag of cocaine and Cantu's hand-tooled leather wallet. Three other friends of victim Cantu arrived at the home at 1:30 p.m. on March 12, 1977. Cantu was on the couch, bleeding about the head. Victim Bopp was kneeling beside the couch. Petitioner was standing by the couch. Petitioner told the three visiters that Cantu had fallen, hitting his head and that he, petitioner, had called an emergency vehicle. Petitioner advised the three to leave if they had any illicit drugs in their possession.

One of the three victims, Victor Loeffel, had transferred four one pound zip-lock bags of marijuana and a quantity of cocaine to victim Cantu on the night before the murders.

Other witnesses testified that petitioner produced a total of four pounds of marijuana on March 12, 1977, after the murders. Between three-thirty and four o'clock p.m., on March 12, petitioner divided one pound of marijuana with Harold Fraker. Between four and five o'clock, petitioner sold one pound of marijuana to Kenneth Moder. Moder had called peti-

tioner at eleven o'clock a.m. on March 12 and ordered a pound of marijuana. Petitioner advised Moder he would obtain the marijuana and deliver it. At five o'clock p.m. on March 12, petitioner left two and a half pounds of marijuana with George Dingledine.

Petitioner had purchased two boxes of .22 caliber ammunition from a gun store on March 11, 1977. The hand tooled leather wallet found at petitioner's home was identified by a witness as belonging to victim Cantu. Darrell Smith, an associate of both petitioner and victim Cantu, testified that Cantu regularly "fronted" or transferred marijuana to buyers with payment to be forthcoming. Smith related a March 1, 1977 statement by victim Cantu that Cantu had "fronted" marijuana to petitioner and was owed sixteen hundred dollars.

David Diehl, acquainted with both Cantu and petitioner, was present in January or February when Cantu supplied petitioner five pounds of marijuana with petitioner owing Cantu fifteen hundred fifty dollars for the sale.

Petitioner testifying on his own behalf, admitted being present at the victim's home between one thirty and one forty-five p.m. on March 12 and that Cantu was lying on the couch with blood on his head. Petitioner stated the victim Bopp had called an ambulance. He agreed that three persons (including Loeffler) had arrived and left after which he left. Petitioner denied owing Cantu sixteen hundred dollars, stating the amount was fifteen hundred and were related to the five pound transaction in February. He admitted that he had no money with him when he was at Cantu's at one thirty p.m. and that he had over seven hundred dollars with him at Kenneth Moder's house at five p.m.

He claimed ownership of the hand tooled leather wallet and explained the blood on his pants as being from a minor cut on his wrist occurring in a traffic accident. The investigating traffic officer noted no injuries and no complaint of injuries by petitioner.

ARGUMENT

I

A GOOD FAITH ERROR IN A SEARCH WARRANT AFFIDAVIT DOES NOT REQUIRE SUPPRESSION OF EVIDENCE SEIZED THEREUNDER WHEN THE ERROR IS NEITHER INTENTIONALLY NOR RECKLESSLY MADE AND THE REMAINDER OF THE AFFIDAVIT CONTAINS SUFFICIENT INFORMATION TO CONSTITUTE PROBABLE CAUSE.

Warrants are to be examined in a common sense and realistic fashion. *United States* v. *Ventresca*, 380 U.S. 102 (1965). Probability, not a prima facie case or proof necessary to convict, remains the test for the issuing magistrate.

The affidavit recited facts known to police. Both victims died of gunshot wounds. Recovered bullets were .22 caliber. The time of death was the afternoon of March 12, 1977. A named witness, present at the time, observed one victim bleeding from the head. The second victim was present as was the petitioner. The witness passed a polygraph examination. Named witnesses knew one victim was engaged in illicit narcotics transactions. The named witnesses assisted police in

preparation of a composite drawing of the person at the scene, petitioner. Probable cause existed for issuance of the search warrant.

Petitioner's single complaint is that the affidavit erroneously stated that named witness Smith was present when Cantu met petitioner on March 8, 1977 to discuss a drug sale indebtedness, rather than that Cantu related that fact to Smith. The affiant understood Smith to state he was present when victim Cantu met petitioner. Both the trial court and the Ohio Court of Appeals found the error to be inadvertent. Petitioner has not claimed the error to be intentionally or recklessly made and conceded in the Ohio Court of Appeals that the warrant could have been based on the information in question if properly characterized as hearsay. (Opinion of the Court of Appeals, Appendix to Petition, pages 34-35)

A good faith error in a carefully prepared search warrant affidavit does not require suppression of evidence. *United States* v. *Luna*, 525 F. 2d 4 (6th Cir., 1975); *United States* v. *Marihart*, 492 F. 2d 897 (8th Cir., 1974); *United States* v. *Scherer*, 523 F. 2d 371 (7th Cir., 1975); *Kahn* v. *Flood*, 550 F. 2d 784 (2nd Cir., 1977). In claiming that the exclusionary rule must operate to suppress evidence due to an allegedly false statement in an affidavit, the movant must successfully demonstrate that the erroneous information was presented knowingly or recklessly to deceive the issuing magistrate. *United States* v. *Rosenbarger*, 536 F. 2d 715 (6th Cir., 1976). See also, *United States* v. *Taxe*, 540 F. 2d 961 (9th Cir., 1976).

In view of the clarity and uniformity of decisions cited, it is respectfully submitted that the Writ of Certiorari should not issue on this question.

II

THE HEARSAY RULE DOES NOT EXCLUDE AN OUT OF COURT STATEMENT OF AN UNAVAILABLE WITNESS WHERE SUCH STATEMENT, AT THE TIME OF ITS MAKING, SO FAR TENDED TO SUBJECT THE DECLARANT TO CIVIL OR CRIMINAL LIABILITY THAT A REASONABLE PERSON WOULD NOT HAVE MADE THE STATEMENT UNLESS HE BELIEVED IT TO BE TRUE.

The traditional common law rule regarding declarations against interest has long been followed in Ohio. *Bird* v. *Hueston*, 10 Ohio State 418 (1859); *Neighbors* v. *State*, 121 Ohio State 525 (1930). The modern trend has been to include declarations against the penal interest of declarant in the general exception to the hearsay rule. See 20 *American Jurisprudence*, Evidence 556, p. 467; *McCormick on Evidence*, 255, p. 549; *Jones on Evidence*, 4th Ed., Vol. I, 324, p. 602. The penal interest exception to the hearsay rule is recognized in Ohio. *State* v. *Williams*, 43 Ohio State 2d 88 (1975).

The penal interest exception is also recognized in Rule 804(b)(3) of the Federal Rules of Evidence, 28 U.S.C. See, *United States* v. *Goodlow*, 500 F. 2d 954 (8th Cir., 1974); and *United States* v. *Bagley*, 537 F. 2d 162 (5th Cir., 1976).

Although the hearsay rule and the Confrontation Clause generally protect similar values, the overlap is not complete. *California* v. *Green*, 399 U.S. 149 (1970). See also, *Chambers* v. *Mississippi*, 410 U.S. 284 (1973).

The statement of the declarant (victim Cantu) that he had sold a large quantity of marijuana to petitioner was corroborated by testimony of witness Diehl who was present when Cantu supplied petitioner with five pounds of marijuana on credit. The transaction is aggravated trafficking in drugs under Ohio law.

In view of the recognition accorded the penal interest exception to the hearsay rule by decisions of this Court and the several other jurisdictions cited, it is respectfully submitted that the Writ of Certiorari should not issue on this question.

CONCLUSION

No unreasonable search was conducted pursuant to the warrant. The magistrate was presented with sufficient information from both the personal knowledge of police investigators and from named civilian witnesses to support a finding of probable cause. A concededly unintentional error in a carefully prepared search warrant affidavit is not grounds to suppress evidence.

Neither the hearsay rule nor the Confrontation Clause preclude admission of a statement of an unavailable witness which, at the time made, so far tended to subject the declarant to criminal liability that a reasonable person would not have made the statement unless true.

It is respectfully submitted that in light of the decisions of this Court and those courts of the several jurisdictions cited within, that the Writ of Certiorari should not issue.

Respectfully submitted,

GEORGE C. SMITH
Prosecuting Attorney
Franklin County, Ohio
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555

and

ALAN C. TRAVIS
Assistant Prosecuting Attorney

Counsel for Respondent

CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(b) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon M. Claude Sharf, 3435 East Livingston Avenue, Columbus, Ohio 43227, this 17th day of April, 1979, by United States mail, postage paid, and that all parties required to be served, have been served.

Alan C. Travis

ALAN C. TRAVIS
Assistant Prosecuting Attorney
Counsel for Respondent

APPENDIX

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

Case No. 77CR-03-742

State of Ohio,

Plaintiff,

-vs-

Rex Allen Wilson,

Defendant.

JUDGMENT ENTRY

The Court coming now to consider the judgment of the Supreme Court of the United States in *Lockett* v. *Ohio*, 438 U.S. ———, 98 S. Ct. 2954 (1978), and in conformity with the mandate issued on the basis thereof, hereby orders that the judgment and sentence of death is modified and reduced to life imprisonment. It is further ordered that the Clerk of this Court issue a certified copy of this entry to the Superintendent of the Southern Ohio Correctional Facility who shall acknowledge receipt thereof. Credit for pre-trial confinement, from March 16, 1977, ORC §2967.191.

THOMPSON, JUDGE

Filed April 3, 1979